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No. 99-61

In The

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

BILL PRYOR, ATTORNEY GENERAL FOR THE STATE OF ALABAMA, AND THE STATE OF ALABAMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM FOR RESPONDENTS BILL PRYOR AND THE STATE OF ALABAMA

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§2721-2725, violates the Tenth Amendment.

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MEMORANDUM FOR RESPONDENTS BILL PRYOR AND THE STATE OF ALABAMA

Bill Pryor and the State of Alabama do not oppose the granting of the writ of certiorari in this case. Contrary to the Solicitor General's suggestion that this case be held pending the disposition of *Reno v. Condon*, Pet. at 11, however, they respectfully suggest that certiorari be granted and that this case be consolidated with *Reno v. Condon*, cert. granted, No. 98-1464 (May 17, 1999). As with *Reno v. Condon*, this case involves a challenge to the constitutionality of the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"), 18 U.S.C. §§2721-2725 (1994 & Supp. III 1997). The United States Court of Appeals for the Eleventh Circuit held that DPPA is unconstitutional because it requires state officials to administer a federal program and thereby violates the Tenth Amendment. *Pryor v. Reno*, Pet. App.1a-16a. Consolidation is appropriate because Alabama practice pre-DPPA, as well as that of most of the other States, differed from that of South Carolina, and that difference highlights important State interests.

Notwithstanding their belief that certiorari is appropriate, Respondents submit this Memorandum for two reasons. First, Respondents will clarify the purposes and effect of the Act and identify its impact on the State of Alabama. As noted, Alabama's information disclosure practices differ from those of South Carolina, and those differing state policies warrant review of this case instead of disposition based solely on *Reno v. Condon*. Second,

Respondents will briefly show that DPPA is unconstitutional when tested against this Court's Tenth Amendment jurisprudence.

COUNTERSTATEMENT OF THE CASE

In this action, the State of Alabama and its Attorney General challenged the constitutionality of the DPPA. The District Court construed the Government's Motion to Dismiss as a Motion for Summary Judgment and granted it. Pet. App. 17a-51a. On appeal, the Eleventh Circuit reversed the District Court's ruling and remanded for entry of an injunction prohibiting enforcement of the DPPA. Pet. App. 1a-16a.

Under Alabama law, all records kept in the course of executing the duties of public office are public writings subject to the general laws of public records. Driver's license records are no exception. Section 32-6-14 of the Code of Alabama requires the Director of the Alabama Department of Public Safety to index and maintain a record of every license application that his office receives. Section 32-7-4 of the Code of Alabama requires the Director to release abstracts of the operating record of any person subject to that chapter. The effect is to make motor vehicle registration information a public record under Section 36-12-40 of the Code of Alabama.

The Alabama Department of Public Safety discloses driver registration information for a $5.75 administrative fee. ALA. CODE §32-7-4 (1989). It does not traffic in the commercial sale of public motor vehicle registration

information. Any commercial activity involving such information is only incidental to its release.

DPPA changes this public records practice. It directly commands the States, including Alabama, not to disclose state motor vehicle and driver's license records except as provided in the Act. 18 U.S.C. §2721(a). The Act makes it unlawful for a State licensing agency and its officers, employees, and contractors knowingly to disclose or otherwise make available personal information for any purpose other than a permissible use. 18 U.S.C. §2721(b). It threatens criminal and civil liability for noncompliance, including a civil penalty for States whose licensing agencies have a policy or practice of substantial noncompliance and civil liability for persons who disclose protected information. 18 U.S.C. §§2723, 2723(b), 2724(a), 2724(b).

The Act goes on to recognize that there are many legitimate governmental and public purposes that support disclosure of this information. It provides for those purposes through a series of mandatory disclosures and a second series of permissive disclosures. 18 U.S.C. §§2721(b), 2721(b)(1)-(14). The Eleventh Circuit described the circumstances of disclosure as "abundant." *Pryor v. Reno*, Pet. App. at 3a.

The Solicitor General asserts that Congress enacted DPPA "[b]ased on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records." Pet at 5. Some of the points it makes regarding the legislative history require clarification. First, the Government references the murder of actress Rebecca Schaeffer by a stalker who purportedly

obtained her home address through her state motor vehicle records. The same legislative history shows, however, that the stalker obtained that information from a licensed private investigator. Ironically, in DPPA, Congress permits disclosure to licensed private investigative agencies or security services. 18 U.S.C. §2721(b)(8). Now, under DPPA, a stalker need only provide a pretextual reason to a private investigator in order to obtain access to personal information in motor vehicle records.

In addition, Congress passed federal anti-stalking legislation that addresses this problem directly. See 18 U.S.C. §2261A. This legislation duplicates the anti-stalking legislation passed by many of the States. See, e.g., ALA. CODE §§13A-6-90 to 13A-6-94 (Supp. 1993); see also James L. Hankins, Comment, *Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon*, 46 Okla. L. Rev. 109, 125 and n.77 (1993) (collecting citations).

REASONS FOR GRANTING THE WRIT

As this Court recognized in granting certiorari in *Reno v. Condon*, challenges to the constitutionality of DPPA have produced a division among the circuits and raised issues of national importance. While those factors are present in this case, another element warrants review of this case. Alabama's open records practice is representative of the laws of a large majority of States before those state laws were changed in response to DPPA; South Carolina's law regarding disclosure of information from motor vehicle records represents a minority (if not

unique) setting. The laws of Alabama and the other States following the majority approach reflected important policy decisions not directly presented in South Carolina's challenge to DPPA.

The States that had open records practices pre-DPPA promoted a variety of public interests. First, from the point of view of States as autonomous governmental entities, open records policies serve the interest of exposing government operations to public view and, thereby, disciplining those operations through the political process so as to ensure public confidence in the democratic system. There were other benefits, as well. Professor Odom and Mr. Feder explain:

> State and local governments benefit from the availability of this data to many citizen groups. Private citizens in Madison, Wisconsin, used motor vehicle records to identify men searching for prostitutes in order to send the men letters to discourage their patronage. Other citizens used this technique to discourage street-corner drug sales. Until thwarted by the DPPA, a Regional Ozone Coalition planned to use motor vehicle records to identify owners of polluting cars in Ohio and Kentucky to encourage them to clean up their exhaust. Mothers Against Drunk Driving ("MADD") chapters have used information from motor vehicle records to protect children from alcohol abusers. Advocacy groups for the handicapped use the records to discourage illegal parking in parking spaces reserved for the handicapped.

Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism*, 53

Miami L. Rev. 71, 109 (1998) (footnotes omitted). They also report that the Detroit News used motor vehicle records to determine whether four State legislators lived in the districts that they represented. *Id.* at 110-11 (footnote omitted).

Under the classic view of federalism, the States are entitled to weigh the competing interests and strike a balance between the benefits of openness and those of privacy. These federalism interests are protected by the Tenth Amendment.

Although the Solicitor General presents a question that is so broadly phrased as to suggest potential challenges to the Eleventh Circuit's ruling under several constitutional provisions, the Petition presents only a Tenth Amendment argument Neither this Petition nor the Petition in *Reno v. Condon* seeks to justify DPPA as an exercise of Congress' power under Section 5 of the Fourteenth Amendment. Cf., *Reno v. Condon,* Reply Memorandum for the Petitioners, at 2 ("The government does not rely in this court on Section 5 of the Fourteenth Amendment as a basis for the DPPA . . . "). Likewise, although the Petition asserts various connections between DPPA and Congress' Commerce Clause powers, those assertions are inapposite. Legislation based on the Commerce Clause is subject to federalism restraints, including those imposed by the Tenth Amendment. The Commerce Clause provides only dubious support because Congress exempted virtually all interstate commerce connections from the Act. As the Eleventh Circuit noted:

> In trying to protect legitimate governmental and business uses of [motor vehicle] information . . . , Congress riddled the Act with more

> holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act.

Moreover, a statute that violates the Tenth Amendment cannot be saved by pointing out a Commerce Clause basis for it. DPPA violates the Tenth Amendment because it requires state officers to administer a federal program. In both *New York v. United States* and *Printz v. United States*, this Court held that Congress lacked the power to direct the States to "administer or enforce" a federal regulatory program. See *Printz*, 117 S. Ct. 2365, 2383 (1997); *New York*, 506 U.S. 144, 188 (1992). Yet, that is precisely what DPPA does.

The Act directs State motor vehicle authorities under what circumstances they must, may, and may not comply with a request for information. First, the State officer must determine whether the information sought is "personal information" within the meaning of DPPA. If "personal information" is sought, the State official must determine whether the information fits within the mandatory disclosure provisions in the "flush" language in 18 U.S.C. §2721(b). If the information is not subject to mandatory disclosure, the State official must determine whether the requested information fits within one or more of the enumerated permissive disclosures, see 18 U.S.C. §§2721(b)(1)-(b)(14), or whether disclosure is prohibited. The effect is to shift the burden of political accountability from the federal government, which issued the directive, to state officials, who must decide how the Act is to be applied to specific requests for information. See *Pryor v. Reno*, Pet. App. at 10a ("In reviewing requests

and interpreting the rules, state officers will be acting as federal agents making federal policy.").

This Court's precedents do not permit Congress to shift political accountability in this manner. Under the Commerce Clause, Congress is empowered to enact laws of general applicability that apply to States only incidentally. Such laws of general applicability impose similar burdens on the federal government and the private sector. In *South Carolina v. Baker*, 485 U.S. 505 (1988), for example, this Court held that Congress did not exceed its powers when it required States as well as the federal government and private citizens to issue bonds in registered form.

In contrast, DPPA cannot be considered a law of general applicability. DPPA targets the States for unique burdens while leaving unregulated most federal agencies and private sector operators (e.g., direct mailers) that maintain databases that contain similar "personal information" on individuals. Only States license drivers, and only States maintain databases of licensing information. As in *Printz*, any suggestion that the Act could be extended to private citizens "posits the impossible." 117 S. Ct. at 2383 n.17.

Instead of legislatively requiring the States to administer a federal program in violation of the Tenth Amendment, Congress could have enacted its policy in ways that do not run afoul of the Constitution. Congress could have used the appropriation process and its Spending Clause powers to give additional funding to States that administer their records in accordance with federal policy. Such an exercise of Congress' Spending Clause power would,

of course, have to comply with *South Dakota v. Dole*, 483 U.S. 203 (1987). Alternatively, Congress could have preempted the field, taking over the entire process of licensing drivers and registering motor vehicles. Finally, Congress could enact a generally applicable law of information privacy that applied only incidentally to States and State records. In doing so, Congress would have to act consistently, something that its present information privacy laws fail to do. Although the Solicitor General contends that different contexts require different approaches, he fails to explain why, on the one hand, names, addresses, and Social Security numbers should be available from credit reporting agencies subject to the Fair Credit Reporting Act, but, on the other hand, dissemination of the same information from motor vehicle records is criminalized. See Odom & Feder, *supra*, at 94. Likewise, the Solicitor General fails to explain why names, addresses, and medical information, linked to displayed registration numbers on aircraft, should be available from the Federal Aviation Administration. See *Condon v. Reno*, 155 F.3d 453, 465 n. 9 (4th Cir. 1998).

Finally, certiorari is appropriate because there is a split in the Circuits. The Fourth and Eleventh Circuits have declared DPPA unconstitutional. *Condon v. Reno; Pryor v. Reno*. The Seventh and Tenth Circuits have upheld the Act against constitutional challenge. *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir.1998). This Court should proceed to resolve that split by declaring DPPA unconstitutional.

CONCLUSION

For the foregoing reasons, Respondents agree that the Petition should be granted, but submit that the issue raised in the Petition should be limited to whether DPPA violates the Tenth Amendment, and that this case should be consolidated with *Reno v. Condon*.

Respectfully Submitted,

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